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No. 99-557

IN THE
Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Petitioner,

v.

CATHERINE NATSU LANNING, ALTOVISE LOVE, BELINDA KELLY DODSON, DENISE DOUGHERTY, and LYNNE ZIRILLI,

and

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

ANN ELIZABETH REESMAN *
MCGUINESS NORRIS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for *Amicus Curiae*
Equal Employment
Advisory Council
* Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of Petitioner in this case. The written consents of Petitioner Southeastern Pennsylvania Transportation Authority and of Respondent United States of America have been filed with the Clerk of the Court. Coun-

sel for Respondents Catherine Natsu Lanning, Altovise Love, Belinda Kelly Dodson, Denise Dougherty, and Lynne Zirilli has refused consent.

In support of its motion, EEAC by the following shows that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties.

1. The Equal Employment Advisory Council (EEAC or Council) is a nationwide association of private sector employers organized in 1976 to promote sound programs to eliminate employment discrimination. Its membership now includes more than 300 of the nation's largest companies. They all are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), and other laws prohibiting employment discrimination.

2. EEAC's members are firmly committed to the principle of equal employment opportunity. They devote extensive resources to compliance programs designed to ensure that all of their employment actions are carried out in accordance with Title VII and other applicable legal requirements.

3. Collectively, EEAC's member companies make and implement millions of employment decisions each year, including hires, promotions, transfers, terminations, and other employment actions. Many of these companies use objective selection devices, including tests, to select among candidates for employment, for promotion, for training opportunities, and the like. Given their significant interest in obtaining the better candidates, they routinely use cutoff scores that are above—sometimes well above—the bare minimum qualifications necessary to do the job.

4. From time to time, a facially neutral selection criterion will have a disproportionate impact on the members of a protected class, making the company vulnerable to charges and/or lawsuits alleging discrimination. Consequently, EEAC members have an ongoing, substantial interest in how the courts interpret the provisions of Title VII, including the provisions added to that law by the Civil Rights Act of 1991, and particularly the requirement that such criteria be job-related and consistent with business necessity.

5. For this reason, the Court of Appeals' decision is especially troublesome for private sector employers, holding that a cutoff score on a test can survive a disparate impact challenge *only* if it can "be shown to measure the *minimum* qualifications necessary for the successful performance of the job in question . . . ." Pet. App. 3a (emphasis added). The decision is contrary to this Court's decision in *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971), and its progeny, as well as to the governing statute and the relevant regulatory guidelines. As a practical matter, moreover, the decision conflicts with accepted professional practice and severely intrudes on an employer's important business interest in selecting, wherever possible, the better candidate from the pool of available workers. Accordingly, the panel's decision will have a devastating effect on private sector employers' ability to select the better candidates for jobs.

6. Because of its long-standing interest in and familiarity with these issues, EEAC is well situated to brief the Court on the potential implications the decision in this case could have for employers in general.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

ANN ELIZABETH REESMAN *
McGUINESS NORRIS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for *Amicus Curiae*
Equal Employment
Advisory Council

* Counsel of Record

October 27, 1999

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*, contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus*, its

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound programs to eliminate employment discrimination. Its membership now includes more than 300 of the nation's largest private sector companies. They all are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), and other laws prohibiting employment discrimination.

EEAC's member companies are firmly committed to the principle of equal employment opportunity. They devote extensive resources to compliance programs designed to ensure that all of their employment actions are carried out in accordance with Title VII and other applicable legal requirements.

Many of these companies use objective selection devices, including tests, to select among candidates for employment, for promotion, for training opportunities, and the like. Given their significant interest in obtaining the better candidates, they routinely use cutoff scores that are above—sometimes well above—the bare minimum qualifications necessary to do the job.

The Court of Appeals' decision holding that cut scores may be used only if they measure *minimum* qualifications will have a devastating effect on private sector employers' ability to select better candidates for jobs. For this reason, EEAC's members have a significant interest in the case.

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members, or its counsel made a monetary contribution to the preparation or submission of the brief.

STATEMENT OF THE CASE

The individual Respondents are five applicants for positions as SEPTA transit police officers who failed SEPTA's physical fitness test requiring them to run 1.5 miles in 12 minutes. They brought a class action against SEPTA under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, claiming that the test unlawfully discriminates against women. Pet. App. 7a. The United States of America filed a similar lawsuit, consolidated with its predecessor for trial. *Id.* at 7a-8a. The District Court concluded that the test did not discriminate against women in violation of Title VII. *Id.* at 8a.

On appeal, two judges of a three-judge panel of the Third Circuit reversed and remanded the District Court's decision, holding that the District Court applied an erroneous legal standard in reviewing SEPTA's business justification for the physical fitness test. According to the Court of Appeals, "under the Civil Rights Act of 1991, a discriminatory cutoff score on an entry level employment examination must be shown to measure the minimum qualifications necessary for successful performance of the job in question in order to survive a disparate impact challenge." *Id.* at 3a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The instant case involves an issue of extreme importance to private sector employers as well as the parties to the case, and deserves consideration by this Court. The Court of Appeals' ruling, that a cutoff score on an employment selection test, if it has adverse impact, violates Title VII if it is set higher than the bare minimum necessary to perform the job, is contrary

to this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and its progeny, as well as to the governing statute, and to the relevant regulatory guidelines. It also is contrary to accepted professional practice.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS CONTRARY TO THIS COURT'S PRECEDENT

A. The Court of Appeals' Decision Inappropriately Imbues *Griggs* with a "Mission" It Then Proceeds to Implement

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). In 1971, this Court ruled that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Holding that requiring a high school education or passing a standardized intelligence test violated Title VII because the employer made no "meaningful study of their relationship to job-performance ability," *id.*, the Court explained that selection practices that exclude members of a protected class at a disproportionate rate are unlawful unless they "bear a demonstrable relationship to successful performance of the jobs for which [they are] used." *Id.* The Court expressed the applicable standard in several other ways as well, stating that "[t]he touchstone is business necessity," *id.* at 431, and that using an employment practice that has a disparate impact on a protected class is prohibited by Title VII unless is can be shown to be "related to job performance." *Id.*

Nothing in *Griggs*, however, suggests that the selection procedure must be calculated to evaluate only *minimum* qualifications. On the contrary, this Court stated, "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." *Id.* at 436. The Court quoted in another context a Congressional memorandum stating that:

> There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. *An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.*

110 Cong. Rec. 7213 (quoted in *Griggs*, 401 U.S. at 434 n.11) (emphasis added).

The Court of Appeals inappropriately ascribes to *Griggs* and its progeny a "mission" on which it then relies for its decision in this case. *E.g.*, "The laudable mission begun by the Court in *Griggs* . . . was the eradication of discrimination through the application of practices fair in form but discriminatory in practice . . . ." Pet. App. 16a. From here, the Court of Appeals leaps to the conclusion that requiring employers to set cutoff scores at the lowest common denominator is the *only* way to fulfill this "mission". *Id.* Totally absent from this analysis is any actual *support* from *Griggs* for this conclusion.

Court decisions—even Supreme Court decisions—have holdings, not missions. The *holding* in *Griggs* is that selection practices that exclude members of a protected class at a disproportionate rate are unlawful unless they "bear a demonstrable relationship to successful performance of the jobs for which [they are] used." *Griggs*, 401 U.S. at 431. Nothing in *Griggs* supports the extreme, contrived holding of the Court of Appeals in this case.

B. The Court of Appeals Decision Mistakenly Reads *Albemarle* as Supporting Only Testing For "Minimum" Qualifications, When In Fact This Court's Reference Was To "Minimal" Qualifications

Applying *Griggs* in *Albemarle Paper Co. v. Moody*, this Court articulated the relative standards of proof as follows:

> In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Id.* at 432.

422 U.S. 405, 425 (1975). Noting that the employer had made "no attempt . . . to analyze jobs in terms of the particular skills they might require," *id.* at 430, the Court found fault with the employer's attempt to establish a business justification by comparing supervisory evaluations and test scores of employees at the top-most rungs of a line of progression. As the Court pointed out:

> The fact that the best of those employees working near the top of a line of progression score well

> on a test does not necessarily mean that the test, or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers entering lower level jobs.

Id. at 434. In so doing, the court established that an employer using a test that has disparate impact must show that the test is job related for the position for which it is being used. *Id.* Again, nothing in the decision requires the employer to evaluate candidates using the lowest common denominator.[2]

Again pursuing the "*Griggs* mission" theory, the Court of Appeals misstates the above-quoted language from *Albemarle*, substituting the word minim*um* for the word the Court actually used—minim*al*. Thus, the Court of Appeals decision states that "In *Albemarle*, the Court explained that discriminatory tests must be validated to show that they are 'predictive of . . . important elements of work behavior which comprise . . . the job . . . for which candidates are being evaluated' [here the Court of Appeals ends its quotation and begins to paraphrase] and that the scores of the higher level employees do not necessarily validate a cutoff score for the [here the Court of Appeals substitutes its own word—"minim*um*"—for the one this Court actually used, "minim*al*"] qualifica-

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[2] See also *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (requiring that "the employer prove[] that the challenged requirements are job related"); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 and n.31 (1979) (equating "job related" with *Griggs*' "manifest relationship to the employment in question."). In each of these cases, while the Court required a showing that the test was *related* to the job, it never required that the test address only minimum job qualifications.

tions to perform the job at an entry level." Pet. App. 17a.

By misstating the *Albemarle* language, the Court of Appeals erred in two ways. First, it created "support" for its holding where there actually was none, since it now has the Court using the term "minimum qualifications." Second, it rendered the quotation meaningless in the *Albemarle* context, since the Court *actually* was comparing the relatively high qualifications that may be necessary to perform jobs at the top level of progression with the minim*al* qualifications necessary to perform entry level jobs.

Accordingly, contrary to the Court of Appeals' opinion, *Albemarle* provides no support whatsoever for the Court of Appeals' holding.

C. The Court of Appeals' Citation From the Uniform Guidelines Omitted Language That Contradicts Its Holding

The Court of Appeals cited the Uniform Guidelines on Employee Selection Procedure (UGESP) provision on cutoff scores, which begins, "Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force." 29 C.F.R. § 1607.5(H). Notably, nothing in this sentence requires that cutoff scores be set at minimum qualification levels. In any event, the next sentence, which the Court of Appeals did *not* quote, says:

> Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for em-

> ployment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

Id.

Thus, the UGESP explicitly allows employers to use higher than minimum cutoff scores in making selections.

D. The Civil Rights Act of 1991 Does Not Require Employers To Set Cutoff Scores At Minimum Qualifications

In its 1989 decision in *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), this Court once again applied the *Griggs* standard, and also confirmed that "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff." *Id.* at 659. While this Court viewed *Ward's Cove* as progeny of *Griggs*, Congress apparently did not. When it amended Title VII in several respects in the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (November 21, 1991), Congress added, for the first time, a specific provision allocating the burden of proof in "disparate impact" cases. *Id.* at § 105, codified as 42 U.S.C. § 1000e-2(k). In so doing, Congress stated that one of the purposes of the Act was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." Pub. L. 102-166 at § 3(2).

The new section states in pertinent part:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> > (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity[.]

42 U.S.C. § 2000e-2(k)(1)(A)(i). Notably, nothing in the plain language of the new section says *anything* about requiring employers to select using only *minimum* qualifications. Nor does the "interpretive memorandum" in the Act's legislative history, which merely states that the Congressional intent is a return to *Griggs*. Interpretive Memorandum, 137 Cong. Rec. S 15276 (October 25, 1991), *reprinted in* 1991 U.S.C.C.A.N. 767. Since, as discussed above, *Griggs* and its progeny do not require employers to select using only *minimum* standards, the new language likewise does not impose such a requirement.

II. THE COURT OF APPEALS' DECISION CONTRAVENES ACCEPTED PROFESSIONAL PRACTICE FOR USING TESTS FOR EMPLOYMENT SELECTION

A. More *Is* Better

"More is better" is the essence of the terms "validity" and "job relatedness." When a test is valid, an increase in test score will be accompanied by an increase in job performance. This happens in a linear fashion, meaning that each given increase in test score

will result in increased job performance by a specified amount.

"In applied psychology, the linear model is ubiquitous." [3] It would be wrong to think that there is a point of diminishing returns beyond which more ability adds little.[4] Such nonlinear relationships occur only under very unusual circumstances.[5]

Thus, the professional literature confirms that, in fact, more *is* better in employment selection, and an employer indeed benefits from selecting those candidates who meet more than minimum standards.

B. Cut Scores Are an Important Tool in the Use of Tests for Employment Selection

Employers use cutoff scores for three primary reasons. First, testing is done continuously in business, often on a daily basis. Consequently, it is not always practically feasible to rank-order job candidates. Second, cut scores prevent hiring managers from making inappropriate distinctions between similar test scores. Third, cut scores prevent untrained managers from imposing their own interpretations on test scores.

As permitted by the UGESP, employers set cut scores above the bare minimum necessary to perform

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[3] D. Lubinski & R.V. Dawis, *Aptitude Skills and Proficiencies*, 3 Handbook of Industrial and Organizational Psychology at 38 (M.D. Dunette & L.M. Hough eds., 2d ed. 1992).

[4] *Id.* at 41.

[5] A study of the *General Aptitude Test Battery*, long used by the United States Employment Service, again, indicated that among 174 validation studies, nonlinear relationships occurred on a less than chance basis. W.M. Coward & P.R. Sackett, *Linearity of Ability—Performance Relationships: A Reconfirmation*, 75 Journal of Applied Psychology 297-300 (1990).

the job at a marginally acceptable level. When using the predicted level of job performance to determine cut scores, employers often take into account the consequences of error on the job for which the test is used. In many jobs, "moderately acceptable" performance is not good enough. In safety-sensitive positions, for example, an employer likely will set higher cut scores in order to achieve higher levels of performance to achieve a higher degree of safety.

Even in situations not involving a safety risk, an employer likely has limited resources to spend on hiring and training, and thus needs to choose those who will be better performers. Particularly for positions for which training is long and costly, the employer has a pressing business need to increase the likelihood that those who enter training will succeed. Many companies spend millions on the development of training courses and find that it costs thousands to run the courses plus pay the salaries of students. A test's utility in terms of cost savings to the employer is directly related to the magnitude of the validity coefficient associated with the test.[6] Consequently, the greater the coefficient the greater the business benefit of testing. For example, a company might hire sales people and send them to a four-week training program. The company will recoup its training expenditures most quickly by hiring the candidates who will sell the most.[7]

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[6] H.S. Brogden, *On the Interpretation of the Correlation Coefficient As a Measure of Predictive Efficiency*, 37 Journal of Educational Psychology 65-76 (1946); H.E. Brogden, *When Testing Pays Off*, 3 Personnel Psychology 133-154 (1949).

[7] Besides the relationships of test and performance scores, employers often consider the level of adverse impact at various cut scores, as required by the UGESP.

In addition, applicant flow may be a factor in the decision making process for setting a cut score. In strong labor markets where good candidates are plentiful, an employer may raise a cut score to maximize the performance of future employees. In the opposite situations, when the labor market is tight, an employer may lower its expectations and the cut score in order to hire enough people to perform the work at hand.

C. The Court of Appeals' Suggested Alternatives Are Infeasible

None of the alternatives suggested by the Court of Appeals is feasible. First, the alternative of "validating" the cut score is technically flawed. The term "validity" has been used in the technical literature to refer exclusively to tests and other measuring devices. The serious literature does not mention validating cut scores.

The alternative of eliminating a valid test and replacing it with training would place the employer in the position of using a less valid selection battery and bearing the additional costs of increased training. As discussed above, these costs can be significant. As a general rule, the employer who substitutes training for testing will lose one of the primary benefits of testing.

As Judge Weis noted in his dissenting opinion, the third alternative of finding a new test and setting a separate cut score for each gender is probably unlawful under the Civil Rights Act of 1991's prohibition of adjustments to test scores, 42 U.S.C. § 2000e-2(1). Pet. App. 45a n.11.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANN ELIZABETH REESMAN *
MCGUINESS NORRIS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
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